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640232—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

DAHNE W. WINEBRENNER AND CORNELIUS G. LOOSE

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Eighth Circuit entered February 14, 1945, setting aside respondents' convictions for conspiracy to defraud the United States and remanding the cases to the district court for a new trial.

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 2142–2162) are not yet reported.

JURISDICTION

The judgments of the circuit court of appeals were entered February 14, 1945 (R. 2162–2163),

and a petition for rehearing (R. 2166–2167) was denied March 7, 1945 (R. 2177). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court committed reversible error in instructing the jury when they separated that they should not discuss the case with others and that, while they might discuss it casually among themselves, they should avoid any discussion which would lead them to form definite, fixed ideas.

STATEMENT

Respondents were charged in an indictment returned in the District Court for the Western District of Missouri with conspiracy, in violation of Section 37 of the Criminal Code, 18 U. S. C. 88, to defraud the United States of its right to have the functions of the United States Army Air Forces at Wright Field, Dayton, Ohio, in the procurement of aircraft equipment, carried on in an efficient, fair, and honest manner, and of its right to the conscientious, faithful, and unbiased services of Cornelius G. Loose free from corruption, improper influence, bias, fraud, or personal pecuniary interest. The indictment charged that the respondent Loose was an experienced civilian employee of the Matériel Center at Wright Field,

through which the United States was purchasing large amounts of equipment; that the military personnel in charge of the purchase of these materials relied on his advice; that the respondent Winebrenner intentionally exercised influence over Loose to have contracts awarded at unfair prices to persons who would agree to use the products of the Baker-Lockwood Manufacturing Co., which Winebrenner sold; and that Loose used his influence in behalf of such persons who would use Baker-Lockwood materials and against those who would not use them, without regard to the merits of such materials. (R. 1–13.) The trial extended over a period of seven weeks, from November 2 to December 18, 1943 (R. 81, 97). Respondents were convicted (R. 97–98), and each was sentenced to imprisonment for two years and to pay a fine of $10,000 (R. 107–110).

On appeal, the circuit court of appeals found that there was "abundant evidence" to support the verdict (R. 2151), but the majority of the court felt impelled to reverse the convictions because the trial judge failed to instruct the jury when they separated that they should not discuss the case among themselves (R. 2153–2160). The record does not show the exact terms of the admonition originally given by the trial judge, which was, apparently, to the effect that the jury should not discuss the case with others and that, if they talked about it among themselves, they should be careful not to make up their minds definitely (see

R. 368). The record does show, however, that on the morning of November 5, the day after the taking of testimony was commenced (R. 336, 337), counsel for respondents mentioned their previous objection to the judge's admonition and asked for an instruction that the jury "should not discuss this case among themselves or discuss it at any time or under any circumstances except after its conclusion and submission and then in the jury room" (R. 337–338). After a discussion with counsel (R. 338–340), the judge stated that he would modify his prior admonition, but that he hesitated to contradict it because he felt that it was unnatural for "any intelligent person working upon any undertaking * * * not to at least casually remind themselves of what has been happening" (R. 341). At noon that day the judge made the following statement to the jury (R. 368–369):

> Gentlemen, before you leave, my attention has been called to the fact that some courts have stated that it is desirable that a judge instruct the jury not to discuss the case among themselves during the progress of the trial until its completion, which raises the question as to whether you should not be so instructed in this case. You recall that when I admonished you heretofore as to your conduct during the trial that I said in effect that if you discuss the case among yourselves be careful not to make up your mind finally and definitely about

it, some such language as that. I hesitate about saying to you flatly that you mustn't talk about the case among yourselves for practical reasons, because I know it is so natural for one to discuss with those with whom he is working on a particular undertaking that undertaking and I certainly do not want to make you inanimate beings so far as your relation with each other, but there is a reason for that rule of law that some courts have announced which is very desirable that we accomplish, whether it is necessary to go to the extent that those courts have gone in order to accomplish the result may be debatable. The result that is sought to be accomplished is that you not discuss the case before you to such an extent that you form definite, fixed ideas that would prevent you from changing after you had heard all of the evidence in the case. Now that is the purpose. Now, insofar as it may be necessary for you to avoid a discussion among yourselves in order to accomplish that purpose I say to you avoid discussing the case among yourselves. A casual reference to the case reminding one of the evidence in the case, what has gone before, not in an argumentative attitude or manner, not getting one's self worked up about the case to the extent that you may be committed to a position which you would hesitate about retracting from later, if evidence coming in later might tend to change that idea, doing those things should

> not be done. Do you understand what I have in mind? I go back to this not because it is of any more importance than anything else I said to you, but because my attention has been called to the fact that there are authorities which hold that in order to accomplish the result noted it is desirable that you be instructed to not discuss the case at all; because my attention has been called to those authorities I think it is desirable that I give you this explanation and this further admonition which I have just given you.

The majority of the court below held that this instruction "violated the principle that an accused is entitled to be heard before he is condemned, and the essentials to a fair trial" (R. 2160). The dissenting judge pointed out that there was no suggestion that any of the jurors spoke an improper word throughout the trial, that the jurors were expressly admonished against the misconduct of venting opinions about the case that might commit them before the evidence was in, and that there was no showing that respondents were prejudiced in any way (R. 2160–2162).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that it was error for the trial court not to have admonished the jury that they should not discuss the case among themselves at

all until after it had been formally submitted to them for consideration of the verdict.

2. In holding that it was error for the trial court to instruct the jury that although they might talk about the case among themselves, they should not discuss it to the extent that such discussion might lead them to form definite opinions concerning the case prior to its submission to them.

3. In holding that the trial judge's instruction constituted reversible error despite the absence of any showing of prejudice.

4. In reversing the judgments of conviction.

REASONS FOR GRANTING THE WRIT

1. We think that the admonition given to the jury by the district judge represents a realistic approach to the problem of a jury's conduct in the course of a long trial. As the dissenting judge pointed out, "No normal honest Americans ever worked together in a common inquiry for any length of time with their mouths sealed up like automatons or oysters" (R. 2161). Some discussion relating to the subject matter which occupies the attention of twelve men for a period that may stretch into months is almost inevitable. Under such circumstances it seems to us fairer to all parties to recognize the fact and warn the jury in a practical manner of the dangers to be avoided, rather than to give a formalistic, rigid instruction

imposing upon them a wholly unnatural silence. Here the trial judge, recognizing as he did that some discussion was natural, undertook to explain to the jury that they were not to indulge in the type of discussion which would lead them to form "definite, fixed ideas," and warned them that "insofar as it may be necessary for you to avoid a discussion among yourselves in order to accomplish that purpose I say to you avoid discussing the case among yourselves." He then stated in effect that he did not mean to bar "a casual reference to the case, reminding one of the evidence in the case, * * * not in an argumentative attitude." (R. 368–369.) It seems to us unreasonable to find in this measured instruction, as the majority below did, a grant of authority to the jurors to form opinions prematurely or to divide themselves into separate groups and distinct deliberative bodies (R. 2156, 2157). If merely making a tentative appraisal of evidence has the effect of shifting the burden of proof, as the court below seems to imply (R. 2157), then our whole trial procedure is subject to the same criticism, for no juror who listens intelligently to testimony can avoid forming some tentative opinion on the basis thereof. When the admonition is read as a whole, it is evident that the trial judge merely told the jurors that, although he recognized that some discussion might occur, they should be careful to keep their minds open and avoid the kind of discussion which would commit them to a position.

We do not believe that such a warning can constitute a violation of the "principle that an accused is entitled to be heard before he is condemned" (R. 2160).

This question has importance beyond the immediate case. Long trials, both civil and criminal, are common in federal practice. The problem of the permissible limits of discussion among the jury is not limited to cases where the jury is allowed to separate. On the contrary, discussion among jurors is even more likely to occur in cases in which they are confined together during long periods. Federal judges called upon to preside over such cases ought to know whether they must under all circumstances hold juries to a rule completely barring discussion of the case among themselves, or whether they may, as the trial judge did here, adopt a rule which seems to them in conformity with a realistic view of human conduct. It is a characteristic of federal practice that wide latitude is accorded to federal trial judges in respect of the conduct of trials. Even in civil cases, it was early established that the Conformity Act did not require judges to follow state laws in respect of the "personal conduct and administration of the judge in the discharge of his separate functions." *Nudd* v. *Burrows,* 91 U. S. 426, 442. The decision below, it seems to us, has the unfortunate effect of imposing by judicial decision the type of rigid formula which is prescribed by many state practice acts, but which Congress has not imposed

on federal courts. But if a formula is to be imposed in respect of the duty of federal judges in admonishing juries, then this Court should examine its validity.

2. The decision below also presents an important question as to the scope of appellate review, and is in conflict with the principle underlying many decisions of this Court and of other circuit courts of appeal. By Section 269 of the Judicial Code, as amended by the Act of February 26, 1919, 40 Stat. 1181 (28 U. S. C. 391), Congress has directed that "the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Assuming that the trial judge erred in the admonition which he gave to the jury, we submit that the error falls within the purview of Section 269 and that the convictions should not have been reversed on that ground in the absence of a showing that the substantial rights of respondents had been affected. This is not a situation in which prejudice was so likely to occur that an appellate court ought not to be called upon to weigh imponderable psychological factors. There is no evidence here that the jury discussed the case at all prior to its submission to them. And even assuming that the jury did just what the trial judge told them they might do—discuss the case casually but keep an open mind—respondents were still accorded the right

to which they were entitled, to have their guilt determined by an unbiased jury on the basis of all the evidence presented in open court. Only by conjuring up the remote possibility that the jury, instead of following the main tenor of the judge's charge, interpreted some of his language to allow improper deliberation, is it possible to infer improper conduct on the part of the jury. The majority below, finding merely such a remote possibility of prejudice, reversed convictions which it found to be based on abundant evidence. Yet this Court has stated that "if the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." *Holt* v. *United States,* 218 U. S. 245, 251. Other circuit courts of appeals, presented with definite proof of irregular conduct on the part of jurors, have declined to reverse convictions in the absence of a showing of actual prejudice. See *Roberts* v. *United States,* 60 F. 2d 871, 872 (C. C. A. 4); *Ng Sing* v. *United States,* 8 F. 2d 919 (C. C. A. 9) (unauthorized view of premises by jurors); *United States* v. *Brown,* 79 F. 2d 321, 324 (C. C. A. 2), certiorari denied, 296 U. S. 650 (forecast of result by juror to third party pending trial). Evidence that jurors may have seen newspaper accounts of the case, sometimes containing matter not established by the evidence, presents much more likelihood of prejudice than the conduct authorized by the trial

judge in this case. Yet courts have consistently refused to reverse convictions on such ground in the absence of a showing that the jurors were in fact improperly influenced. *Holt* v. *United States, supra; Welch* v. *United States,* 135 F. 2d 465 (App. D. C.), certiorari denied, 319 U. S. 769; *Shushan* v. *United States,* 117 F. 2d 110, 116 (C. C. A. 5), certiorari denied, 313 U. S. 574; *Itow* v. *United States,* 223 Fed. 25, 28 (C. C. A. 9). It is thus evident that, hitherto, the rule has been well established that where a conviction is attacked because of alleged misconduct on the part of a juror, the complaining party must show actual prejudice, or at the very least a reasonable likelihood of prejudice. The decision below conflicts with these decisions by predicating reversal of the convictions upon the mere remote possibility of prejudice. If authorization to the jurors to discuss the case is so prejudicial as to require reversal, even without a showing that any discussion actually occurred and without regard to the nature of any such discussion, it must follow that proof that the jurors did talk about the case, whether warned against it or not, would likewise require reversal, irrespective of the nature of the discussion. Such a rule would be contrary to all the decisions cited above, and would have the unfortunate result of permitting any slight remark by a juror to jeopardize well-merited verdicts in both civil and criminal cases. We think that the dissenting judge below was correct in stating

that "there is no precedent for reversing this case upon the mere theoretical possibility of jury misconduct that has been propounded" (R. 2162).

3. After a trial lasting seven weeks, respondents were convicted of a gross fraud upon the United States in connection with the procurement of war materials upon evidence found by the district court, the jury, and the circuit court of appeals to be amply sufficient to support the verdict. Many of the witnesses were military personnel who may not be available to testify at a new trial. To allow the convictions to stand reversed on the basis of dubious technical error, and without a showing of prejudice, would be a disservice to the cause of criminal justice.

CONCLUSION

The case presents a question which is important for the future conduct of federal trials, both civil and criminal. It also represents a conflict with the principle underlying the decisions of this Court and of other circuit courts of appeals as to the degree of prejudice which must be shown to warrant a reversal on the basis of alleged misconduct on the part of jurors. We therefore respectfully urge that the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

APRIL 1945.

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